84-1071

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT J. BRACK,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December 31, 1984

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QUESTIONS PRESENTED

1. Whether proof of mere friendship between a defendant and the agent of another party to a contract is sufficient proof of "fraud" in a prosecution under the Mail Fraud statute (18 U.S.C. § 1341).

2. Whether the Court of Appeals erred in affirming Petitioner's conviction on the basis of matters not encompassed in or suggested by the trial Court record.

3. Whether the False Statements Statute (18 U.S.C. § 1001) imposes absolute liability for statements made in a purely private contractual context without proof that the Defendant knew, should have known, or could have had knowledge of the governmental involvement.

4. Whether the Due Process Clause of the Fifth Amendment to the United States Constitution requires that the sufficiency of the evidence at a Defendant's first trial, which resulted in a jury deadlock and mistrial, be reviewable upon appeal from a judgment of conviction after his second trial.

5. Whether proof of ambiguous entries contained in an essentially true statement can support a conviction for making a "false statement" in violation of 18 U.S.C. § 1001.

6. Whether an allegedly "fraudulently inflated price" is sufficient to satisfy the "scheme to defraud" element of a Mail Fraud charge (18 U.S.C. § 1341) absent specific allegations and proof of fraudulent conduct in the negotiation of the price.

7. Whether certain inflammatory and misleading comments made by government counsel in his closing arguments can be considered harmless error, in light of the absense of any proof of fraud.

8. Whether certain improper attempts to impeach the Petitioner by his testimony at a prior trial are harmless, beyond a reasonable doubt, despite the trial Court's general, curative instruction to the jury to disregard matters to which objections were sustained.

9. Whether the evidence presented at either of Petitioner's trials was sufficient to prove each of the elements of the crimes charged.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Robert J. Brack, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 31, 1984.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Illinois.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 31, 1984, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction in invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delievered by

mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

In early 1979, Petitioner, Robert J. Brack, as President of Joseph Construction Company, was contacted by Joseph Cosentino, agent of International Fidelity Insurance Company ("I.F.I.C."), regarding possible completion of a construction project at a Veterans Administration ("V.A.") Hospital, after a prior contractor defaulted on a performance bond issued by I.F.I.C. The performance bond was guaranteed by the Small Business Administration of the United States ("S.B.A."); this formed the basis of the "agency jurisdiction" allegations under 18 U.S.C. § 1001. (The Petitioner was not made aware of the S.B.A. bond guarantee on this project prior to his indictment in 1983.) Mr. Brack obtained two bids from prospective subcontractors for completion of the project. The first was for approximately $152,000 from Raney-Harris, Inc., a reputable roofing concern in the Chicago area with which Mr. Brack was familiar. This bid was based upon removal and replacement of the prior contractor's work, as well as completion of the unfinished portion. The second bid was submitted by one Robert Larson, a sole proprietor doing business as "Larson Roofing," with whom Mr. Brack was not familiar, but who had been recommended by the V.A. engineer in charge of the entire project. (Unbeknownst to Mr. Brack, Larson had promised a "kickback" of $5,000 to the V.A. engineer, in exchange for this recommendation and, presumably, for subsequent approval of Larson's

work.) This bid was for $27,500, and involved only completion of the unfinished portion of the project.

Petitioner advised I.F.I.C.'s agent, Cosentino, regarding this large bid discrepancy and of his misgivings about Larson's ability to perform the work satisfactorily, and to honor the warranty obligations of the original contract, for the seemingly low price indicated. He explained (although he was certainly not obligated to do so) that this was the basis for the price quoted. He then offered to have his company complete the project for a price of $88,547.[1] Mr. Cosentino, on behalf of I.F.I.C., agreed to this price, and the work was subcontracted to Larson for $30,000. ($2,500 had been added to Larson's original bid to induce him to begin work immediately.)

Thereafter, on May 30, and July 30, 1979, Joseph Construction Company submitted Contractors' Statements (which served as invoices) to I.F.I.C., signed by Petitioner,[2] which accurately reflected the total contract price, but concealed the extent of the compensation to Joseph Construction Company (in the event that Larson satisfactorily completed the project) by reflecting a second subcontractor, Stanton Bay. Although Stanton Bay had agreed with Petitioner that it would be available in the event of a default by Larson, no work was done by Stanton Bay, and no payment was made to it in connection with this project, as Larson did complete the work.

In early June, 1979, the May 30 invoice was paid, in the approximate amount of $39,500. This money was held in

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[1] It is important to note that this was a guaranteed price contract, not a "cost-plus" agreement, under which Joseph Construction agreed to assume full responsibility for completion, without regard to its actual expense incurred in doing so, and to honor the two-year warranty specified in the original contractor's contract.

[2] These statements, government Exhibits 11 B and 16 B, are included in the appendix hereto.

reserve against the possibility of a default by Larson, who had not as yet sent his first invoice to Joseph Construction. In late July and early August of 1979, Larson sent two invoices, each in the amount of $10,000, to Joseph Construction. On July 30, 1979, a second payment request, for approximately $30,000, was submitted to I.F.I.C. by Petitioner. No payment was made to Joseph Construction on the basis of this invoice. However, after Larson completed work on the project, and after repeated requests by Petitioner, I.F.I.C. ultimately made a payment directly to Larson, in the amount of $30,000.

Petitioner was indicted by a grand jury for the Northern District of Illinois in February, 1983, on two counts of Mail Fraud—the essence of the "scheme to defraud" being the "fraudulently inflated price" and the concealment of his company's potential profit—and two counts of making false statements in a matter within the jurisdiction of a federal agency, namely the Small Business Administration. A jury trial was convened on April 25, 1983, which resulted in a jury deadlock and the declaration of a mistrial. Thereafter, the Petitioner filed a timely motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which was denied. At his second trial, Petitioner was found guilty, and sentenced to four months' imprisonment, five years' probation, and ordered to pay $27,000 restitution to the S.B.A. A timely appeal followed, and the Court of Appeals for the Seventh Circuit affirmed, after reaching the curious conclusion that (a) Mr. Cosentino was a "co-schemer" with Defendant, although neither the indictment nor the Bill of Particulars so alleged, and (b) Petitioner "knew" that Larson would complete the work for $30,000. The record in this cause offers absolutely no support for either proposition, and the former constitutes what might be termed an "amendment" of the charges themselves. Furthermore, in support of the position that the allegedly false statements in question were "material," in the sense that they were capa-

ble of influencing agency action, the Court of Appeals cited certain regulations empowering the Small Business Administration to audit participants in the bond guarantee program. This was done *sua sponte,* as this theory of "materiality" had not been urged at trial or on appeal by the government.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Represents A Radical Departure from Previous Decisions of this Court Defining "Fraudulent" Conduct.

The overwhelming majority of cases arising under the Mail Fraud statute (18 U.S.C. § 1341), including this Court's most recent decisions,[1] have focused on the "mailing in furtherance" element of the offense. (This is due, no doubt, to the seemingly clear indicia of "fraudulent" conduct which the reported decisions invariably reflect.)

The instant case presents the question of whether the "scheme or artifice to defraud" element of a Mail Fraud prosecution was properly alleged in the indictment, and proven by the evidence. The primary allegation relating to the purported "scheme" was that a "fraudulently inflated price" was negotiated. There was no evidence whatsoever of any collusion, kickbacks, bid-rigging, or any other form of manipulation or misconduct by any party in the negotiation of that price, nor were such practices alleged. Rather, the indictment simply alleged that the price charged was so high[2] as to be "fraudulent."

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[1] United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1959); Periera v. United States, 347 U.S. 1 (1953).

[2] It is interesting to note, however, that the contract price would have doubled if Petitioner's company had subcontracted the work to the higher bidder, and added 15% for overhead and profit.

The Petitioner was next accused of furnishing false information on two pay requests, but there was no allegation, or proof, that this information was related to the entitlement of Petitioner's company to payment under the contract. Rather the indictment alleged, and the evidence showed, the existence of a "contract" between the Petitioner's company and the bonding company (I.F.I.C.), and "satisfactory performance" of that contract by Petitioner's company.

The only element of alleged wrongdoing in this case, then, appears to be Petitioner's failure to disclose, or his concealment of, the profit which his company would have realized[3] if Larson had fully performed its contract, and if I.F.I.C. had paid Petitioner's company the full contract price of $88,547. (Although Larson did perform, I.F.I.C. did not pay the full contract price.)

Petitioner's company had, as the indictment stated, a "contract"—a legally binding agreement founded upon adequate consideration—with I.F.I.C. to complete a defaulted contractor's obligations (including any warranty work) in exchange for a certain price. This contract was verbal, and contained no other terms or obligations on either side.[4]

In *Chiarella* v. *United States*, 445 U.S. 222 (1980), this Court was called upon to interpret the phrase "scheme or

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[3] Actually, the Defendant *did* disclose his company's potential profit, as well as the two bids upon which the price was based, in conversations with I.F.I.C.'s local agent Mr. Cosentino, but not on the invoices submitted to I.F.I.C.'s main office, through its local counsel.

[4] The Court of Appeals' response to Petitioner's contention that civil contract law governed Petitioner's entitlement to the contract price was the unsupported suggestion that the contract was void *ab initio*, and that a standard *less* stringent than that of common law *civil* fraud is to be applied in *criminal* cases.

artifice to defraud," as that term is used in another statute, namely Section 10 (b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j). There, relying upon long-accepted principles of common law, this Court held that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." Id,. at 228, Citing Restatement (second) of Torts § 551 (2) (a) (1976).

There was of course no allegation or proof that Petitioner or his company stood in a "fiduciary or other similar relation" to I.F.I.C.; the Petitioner's company and I.F.I.C. were adverse parties to a contract, and owed each other no duties[5] whatsoever other than performance of that contract.

In short, the instant cause represents an attempt by the prosecution to punish a contractor for charging a price which, in retrospect, may not have been the best price obtainable.[6] As the government's counsel effectively admitted in several highly improper comments to the jury in closing arguments, the Petitioner was attempting, at worst, to "gouge" I.F.I.C.

Diligent research has uncovered no authority whatsoever for the proposition that an allegation of "fraud" can be founded primarily upon the price charged by a party to a

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[5] *See* Tigar, "Mail Fraud, Morals, and U.S. Attorneys," in *Litigation*, The Journal of the Section of Litigation, A.B.A. (Fall, 1984) p. 22, et seq., for a discussion of the novel conecpts of "duty" being fabricated by overly aggressive federal prosecutors.

[6] It should be noted, however, that I.F.I.C. did not seek competitive bids from other contractors, and that it, rather than Petitioner, is thus responsible for any failure to negotiate a better price.

contract, or that a party has a duty to disclose the extent of his potential profit from the contract. And although the Court of Appeals indicated that the contract was not negotiated as an "arm's-length" transaction, the only support it could offer for this proposition was the fact that Petitioner was a "close friend" of the bonding company's local agent, Mr. Cosentino. Of course, it is hardly a secret that salesmen frequently become friendly with purchasing agents; the income tax laws in this country even permit salesmen to deduct reasonable expenses for entertaining potential customers. Thus, in view of the fact that Petitioner was not shown to have provided *anything* of value to Mr. Cosentino to obtain the subject contract--not even a free lunch—the decision below stands for the proposition that any transaction between businessmen who were friendly with one another is subject to later scrutiny—and punishment—under the Mail Fraud statute, and that the element of "fraud" required by said statute is to be simply inferred from the parties' friendship.

It is submitted that the Mail Fraud statute was not intended to place so high a price upon friendship, and was not enacted to punish parties to a private contract for seeking a profit commensurate with the risks undertaken; the judgment of the Court of Appeals should therefore not be allowed to stand.

2. The Decision Below Conflicts with the Decisions of Other Circuit Courts of Appeals as to the Proper Construction of 18 U.S.C. § 1001.

Recently, this Court determined that a defendant's *actual* knowledge of federal involvement was not an essential element to be proven in a prosecution under 18 U.S.C. § 1001, but left open the question of whether *constructive* knowl-

edge—circumstances from which a defendant reasonably should have known—of federal agency jurisdiction must be proven. *United States* v. *Yermian*, ____ U.S. ____, 104 S.Ct. 2936 (1984). There the trial court had instructed the jury that the government was required to prove "that the defendant knew or should have known that the information was to be submitted to a federal agency," without objection by the government. This Court specifically mentioned this instruction, in footnote 14 to its opinion, in response to the contention that 18 U.S.C. § 1001 constitutes "a trap for the unwary."

The element of agency jurisdiction has to some extent become intertwined with the knowledge element, in cases interpreting 18 U.S.C. § 1001. Thus, in *Lowe* v. *United States*, 141 F. 2d 1005 (5th Cir., 1944) the Court held invalid an indictment which showed that "every aspect of his [defendant's] employment was exactly the same as it would have been had there been no contract with any governmental agency of any kind." (Id., at 1006). Thus, although the crucial factor was the absence of circumstances from which the defendant could have known of the governmental involvement, the indictment was held to be legally insufficient for want of allegations to support the "agency jurisdiction" element of 18 U.S.C. § 1001.

The Seventh Circuit has held, to the contrary, that the defendant's knowledge (actual or constructive) need not be proven, although it may be "crucial" where the Governmental involvement "in the matter to which the statement relates is peripheral." Decision below at page 16, citing *United States* v. *Stanford*, 589 F. 2d 285 (7th Cir., 1978). In applying this sliding scale of scienter, the Court below determined that the federal involvement here was not "peripheral."

Recently, the Court of Appeals for the Ninth Circuit, relying almost entirely on this Court's opinion in *Yermian, supra,* held that "no mental state is required with respect to federal involvement in order to establish a violation of [18 U.S.C.] section 1001." *United States* v. *Green,* 745 F. 2d 1205, 36 Cr.L. 2118, 2119 (1984).

The instant case squarely presents the issue reserved by this Court in *Yermian,* and resolved in three conflicting fashions by the various Circuit Courts of Appeals. Moreover, it presents an opportunity for this Court to apply the rule of lenity and formulate a standard which would prevent section 1001 from becoming a "trap for the unwary," *Yermian, supra* and *Green, supra* and avoid "substantially extend[ing] the scope of the statute even to reach, for example, false statements privately made to a neighbor if the neighbor then uses those statements in connection with his work for a federal agency." (*Yermian, supra,* dissenting opinion of Justices REHNQUIST, BRENNAN, STEVENS, and O'CONNOR.

3. The Decision Below Conflicts with Controlling Authority from this Court Regarding the Proper Interpretation of 18 U.S.C. § 1001.

As noted earlier, the "agency jurisdiction" element of 18 U.S.C. § 1001 can become analytically inseparable from the question of the accused's knowledge thereof. This Court has, however, provided a clear interpretation of "agency jurisdiction" distinct from the "knowledge" issue, in *United States* v. *Rodgers,* —— U.S. ——, 104 S.Ct. 1942 (1984). The Court of Appeals in the instant case apparently chose to disregard this interpretation (along with the evidence of the only S.B.A. witness produced by the Government) preferring to augment the record with its own, judicially noticed, authority.

In *Rodgers,* this Court reiterated and refined its previous holding in *Bryson* v. *United States,* 396 U.S. 64 (1969), in which it was held that "the term jurisdiction should not be given a narrow or technical meaning for purposes of [18 U.S.C.] § 1001," and that "a statutory basis for an agency's *request for information* provides jurisdiction enough to punish fraudulent statements under § 1001." *Rodgers,* 104 S. Ct., at 1946-47, quoting *Bryson,* 396 U.S. at 70-71. [Emphasis supplied].

In the instant cause, no "request for information" was made by the S.B.A., nor was it shown to have any "statutory basis" to request the information alleged to be false. The sole S.B.A. representative testified quite clearly that the S.B.A.: (a) did not investigate bond defaults; (b) did not take any action to secure completion of the project after such a default; (c) received nothing, either directly or through a third party, from Petitioner; (d) did not regulate, or even see, the terms of any completion contracts; and (e) was obligated by its contract with I.F.I.C. to reimburse 90% of the latter's losses on the construction project in question.

The Court of Appeals, nonetheless, "judicially noticed" certain statutory and regulatory authority (See Page 16, notes 10-12, of the decision below, in the appendix hereto.) which allows the S.B.A. to audit *bonding companies,* (not completion contractors) that participate in its bond guarantee program. In short, "agency jurisdiction" was found despite the fact that Petitioner furnished information to I.F.I.C. which was not, and most probably could not have been the subject of an S.B.A. "request for information," (*Rodgers, supra*) and in any event never went to the S.B.A.

Accordingly, having established that the term "agency jurisdiction" is to be interpreted broadly—the limits of said term being only the limits of the agency's statutory author-

ity—this Court should review the decision below to enforce those already broad limits to ensure that an excessively broad interpretation is not attached to said term.

4. The Decision Below Conflicts with Decisions of this Court Regarding Appellate Review of Evidentiary Insufficiency Claims.

A substantial portion (22 pages) of Petitioner's main brief in the Court of Appeals was devoted to the legal insufficiency of the evidence at his first trial to support a verdict of guilty on the charges against him. Put another way, Petitioner was requesting appellate review of the Trial Court's denial of his Motion for Judgment of Acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

While Petitioner's appeal was pending, however, this Court decided *Richardson* v. *United States*, ____ U.S. ____, 104 S. Ct. 3081 (1984), which held that evidentiary insufficiency claims may not be reviewed on appeal after a jury-deadlock and mistrial, prior to the conduct of a retrial, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. This was founded, primarily, upon the concept that such a mistrial does not terminate the original jeopardy, and thus does not present the possibility of a "second" jeopardy.

In reaching this conclusion, however, this Court specifically acknowledged its continued adherence to the principles announced in *Burks* v. *United States*, 437 U.S. 1 (1978), which held that an unreversed appellate determination of evidentiary insufficiency terminates further proceedings against a defendant, pursuant to the Due Process Clause of the Fifth Amendment. Likewise, this Court reconciled

its position in *Richardson* with *Tibbs* v. *Florida,* 457 U.S. 31 (1981) and *Jackson* v. *Virginia,* 443 U.S. 307 (1979), both of which held that the Due Process Clause prohibits conviction except upon proof legally sufficient to convince a rational trier of fact. And of course, nothing said in *Richardson* affects the rate announced in *United States* v. *Scott* 437 U.S. 82 (1978), where this Court held that the granting of a Rule 29 Motion for Acquittal is appealable by the Government.

Viewing this mosaic of case law, it is clear that this Court intended one of two possible results when it decided *Richardson.* The first possible scenerio is that a defendant "constitutionally entitled to an acquittal" (*Richardson, supra,* dissenting opinion of Mr. Justice BRENNAN) could be retried an indefinite number of times (so long as the prosecution was able to persuade some fraction of each jury to convict) thereby affording the prosecutor several rehearsals of his trial theory, and several opportunities to modify the manner, and quantum, of evidence presented. Throughout this process, a trial judge sensitive to the possibility of reversal on appeal would deny each successive Rule 29 Motion, knowing that only the grant of such a motion is reviewable. And at the conclusion of this ordeal, after a final judgment of guilty, the defendant would be able to attack only the sufficiency of the evidence at his last trial.

The second scenario, equally consistent with the cited cases, acknowledges the right of both the prosecution and the defense to appellate review of the trial court's ruling on a Rule 29 Motion, and merely requires the defendant, like the government, to await the termination of trial court proceedings (jeopardy) to seek it. This view in essence reads *Richardson* as a bar to *interlocutory* review under the Double Jeopardy Clause, not as a bar to *any* review,

of the trial court's Rule 29 decisions. And, of course, this view preserves the defendant's Due Process rights by merely delaying, rather than precluding their enforcement.

Because it is submitted that the Court of Appeals' adoption of the first scenario is an unduly restrictive reading of *Richardson*, and because of the need to resolve the apparent uncertainty which surrounds this important and recurring question, it is urged that this Court review this issue, as well as the other issues presented herein.

CONCLUSION

The preceding discussion is not an exhaustive treatment of the subjects covered, nor does it address all of the issues on Petitioner's list of "Questions Presented" at the outset hereof.

Rather, it is intended to expose the most glaring defects in the government's case, and indeed in the indictment itself, while simultaneously addressing those questions most in need of resolution by this Court, due to their importance to the administration of criminal justice in all of the federal courts.

Prosecutions under the Mail Fraud and False Statement statutes are becoming increasingly common, as these statutes serve as a "catch-all" to bring before the federal courts the dishonest people, and practices, that might otherwise go unpunished. They have been used to punish and deter mail-order thieves, racketeers, people who sought to receive unwarranted benefits under federal programs, and corrupt politicians.

They are now being used to punish capitalism. For, as the government's counsel admitted in the first trial of this cause, in our capitalist economy a person is certainly free to charge whatever he wants for his goods and services.

However, under the law as announced in the decision below, he does so at the peril of having his profit scrutinized —according to as yet undisclosed standards—his liberty taken away, and his friendships construed as fraud schemes, if he happens to strike a good bargain by doing that which he is free to do.

Under (formerly) well-settled principles of contract law, Petitioner's company is still—as of the date of this Petition—owed approximately $19,000 of the original contract amount; the indictment flatly states that the contract was "satisfactorily perfomed" (Count I, Para. 9) by the subcontractor. Under accepted common law principles, as enunciated in the Restatement (2d) of Torts, and expressly adopted by this Court in *Chiarella* in interpreting the phrase "scheme or artifice to defraud," Petitioner's failure to disclose in writing what he had fully disclosed verbally to I.F.I.C.—even though he had no duty to do so—would not even be actionable as *civil* fraud, let alone punishable as a crime.

In short, if the novel principles of "fraud" and federal criminal jurisdiction announced below are to achieve precedental effect, they should not be allowed to do so without review by this Court.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-3208

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT J. BRACK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 99—Paul E. Plunkett, *Judge.*

ARGUED SEPTEMBER 17, 1984—DECIDED OCTOBER 31, 1984

Before BAUER, POSNER, *Circuit Judges* and CAMPBELL, *Senior District Judge.**

BAUER, *Circuit Judge.* Defendant Robert J. Brack appeals his conviction of two counts of mail fraud, in violation of 18 U.S.C. § 1341,[1] and two counts of making

* Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

[1] Title 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter

(Footnote continued on following page)

false statements, in violation of 18 U.S.C. § 1001.[2] Defendant appeals on the grounds that the indictment was insufficient or that, even if sufficient, there was a variance between the indictment and the evidence presented by the government at his first trial. Defendant also contends that the evidence presented at his first trial, which resulted in a hung jury and a mistrial, was insufficient, and that therefore his retrial violated his Double Jeopardy and Due Process rights. Finally, defendant argues that the evidence presented at his second trial was insufficient, and that he was denied a fair trial by improper attempts to impeach his testimony and by improper comments during the prosecutor's closing argument.

Facts of the Case

Defendant owned and operated Joseph Construction Company, a general contractor. In May of 1979, defendant entered into a contract to complete a roofing project at Hines V.A. Hospital. The project was originally contracted out to Cleary Waterproofing Company [hereinafter Cleary], but Cleary had defaulted on the contract

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[1] *continued*

or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2] Title 18 U.S.C. § 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device of material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

after completing approximately 80% of the work. Cleary's surety, International Fidelity Insurance Company [hereinafter I.F.I.C.], then entered into a contract with defendant to complete the project.

Cleary had obtained a performance bond from I.F.I.C., and this bond was in turn guaranteed by the Small Business Administration as part of a program designed to assist small contractors in obtaining work. Under its bond guaranty program, the SBA guarantees sureties that it will pay 90% of the losses they may suffer as a result of guaranteeing the performance of small contractors who default. Pursuant to this agreement, the SBA was obligated to reimburse I.F.I.C. for 90% of the cost of its contract with Joseph Construction to complete the roofing project at Hines.

I.F.I.C., which is located in New Jersey, had hired Chrismar Management Corporation [hereinafter Chrismar] to investigate the extent of the work already performed by Cleary on the Hines project and the amount of work needed to complete the project. Chrismar is owned and operated by defendant's brother, Thomas Newhall. After its investigation of the Hines project, Chrismar received a bid of $27,500 from Larson Roofing Company to complete the project. Antonio Alvarado, an architect at Chrismar who investigated the Hines project, determined that Larson Roofing's bid to complete the project was reasonable. I.F.I.C., however, was not informed of Larson Roofing's bid.

Shortly after Chrismar had received Larson Roofing's bid, defendant was contacted by Joseph Consentino, an insurance broker with American Bonding Company, the local agent for I.F.I.C. Consentino described himself as a close personal friend of defendant. Consentino requested an estimate from defendant of the cost of completing the Hines project. Defendant, in turn, requested a bid from Rainey-Harris Roofing Company. Rainey-Harris submitted a bid of $152,185, which included the complete removal of all the roofing material, including work already

done by Cleary. At this time, defendant was also informed of Larson Roofing's bid. Defendant then discussed both bids with Consentino, and entered into an agreement with Consentino whereby Joseph Construction would complete the Hines project for $88,547. Shortly after reaching this agreement, on May 21, 979, defendant subcontracted Larson roofing to complete the Hines project for $30,000.

On May 30, 1979 defendant submitted a sworn statement regarding the costs of the Hines project, along with an architect's affidavit, to I.F.I.C. The statement disclosed that Joseph Construction had entered into a contract with Larson Roofing for $34,500 to do roofing work on the project. In fact, Joseph Construction had hired Larson Roofing to complete the Hines project for $30,000. Further, the statement indicated that Joseph Construction has entered into a contract with Stanton Bay Construction to do "Slate Repair" for $31,381. In fact, Joseph Construction had no contract whatsoever with Stanton Bay, which was not qualified to do the roofing work needed on the Hines project. The statement also included amounts of $10,400 and $12,266 to Joseph Construction for "Supervision" and "General Conditions," respectively. Finally, the architect's affidavit was signed by Newhall, who is not an architect, before the figures above were entered on it by defendant.

The May 30 statement sought payment of $39,560 from I.F.I.C. for "work already completed." The statement indicated that the payment requested would be divided as follows: $11,500 to Larson Roofing, $20,460 to Stanton Bay, and $7,600 to Joseph Construction. Upon receipt of the statement, I.F.I.C. issued a check for $39,560 to Joseph Construction. It was not until July 20, however, that Larson Roofing sent its first request for payment to Joseph Construction in the amount of $10,000, and, as just stated, no money was due to Stanton Bay for work on the Hines project.

On July 30, 1979, I.F.I.C. received a similar statement from Joseph Construction, requesting payment in the amount of $29,954. This statement incorporated the figures listed in the May 30 statement and indicated that payments had been made to Larson Roofing and Stanton Bay in the amounts listed in that statement. In fact, no payments to either company had been made. The July 30 statement also indicated that portions of the payment requested would be sent to Larson Roofing and Stanton Bay. Newhall again signed a blank architect's affidavit for the July 30 statement.

Apparently due to a dispute involving payment for other jobs which Joseph Construction had been hired by I.F.I.C. to complete, no payment was made to Joseph Construction based on the second request. Rather, in October of 1979, I.F.I.C. made a direct payment of $30,000 to Larson Roofing, which had received no money from Joseph Construction, for the completion of the Hines project. In fact, Larson Roofing was the only contractor to work on the Hines project, which it successfully completed for $30,000.

On February 7, 1983, defendant was indicted and charged with two counts of mail fraud and two counts of making false statements. The indictment alleged that defendant devised a scheme to defraud the government by obtaining a fraudulently inflated contract with I.F.I.C. and by submitting false statements to I.F.I.C. to conceal the fraudulent nature of the contract. Defendant's first trial ended in a hung jury and a mistrial. At that trial, defendant moved for a directed verdict and, after the mistrial was declared, for judgment of acquittal based on the insufficiency of the evidence. Neither motion was granted, and a second trial was ordered, at which defendant was convicted of all four charges against him.

I. Sufficiency of the Indictment

Defendant first contends that the indictment was insufficient to allege violations of both the mail fraud

counts[3] and the false statement counts.[4] An indictment is sufficient if it contains the elements of the offense charged and adequately informs the defendant of the specific charges against him, enabling him to prepare a defense for trial and permitting him to plead an acquittal or conviction in order to bar any future prosecution for the same offense. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974); *United States v. Debrow*, 346 U.S. 374, 376 (1953); *Hagner v. United States*, 285 U.S. 427, 431 (1932). The indictment in this case meets this standard and the District Court properly denied defendant's motion to dismiss the indictment at trial.

Defendant asserts that the indictment was insufficient for several reasons, all of which relate to the same basic argument. Briefly, this argument states that the contract between defendant, doing business as Joseph Construction, and American Bonding, as agent by I.F.I.C., was an arm's length agreement. Once the contract was formed, defendant claims that he was entitled to the contract amount if he adequately performed the work required by the contract. Therefore, defendant argues that payment of the contract amount was in no way dependent upon his subsequent false statements.

Using this argument, defendant contends that the indictment failed to allege a scheme to defraud the government. Similarly, defendant asserts that, because the SBA was already obligated to pay 90% of I.F.I.C.'s losses

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[3] The charge of mail fraud, 18 U.S.C. § 1341, which comprises counts I and II of the indictment, consists of two elements; 1) a scheme to defraud and 2) the use of mail in furtherance of that scheme. *See United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).

[4] The charge of making a false statement in violation of 18 U.S.C. § 1001, which comprises counts III and IV of the indictment, consists of 1) making a false statement 2) of material fact 3) with fraudulent intent 4) in any matter within the jurisdiction of any federal department or agency. *See United States v. Weatherspoon*, 581 F.2d 595, 601 (7th Cir. 1978).

on the Hines project after Cleary's default, the false statements submitted to I.F.I.C. on May 30 and July 30, 1979 did not affect SBA's liability and were not "material" within the meaning of § 1001.

The fatal flaw in defendant's basic argument, and hence in his several contentions, is the presumption that the initial contract amount was the result of an arm's length bargain. To the contrary, the indictment alleges that defendant fraudulently calculated the amount of the contract, that he obtained the contract for a fraudulently inflated amount, and that he later sought to conceal the fraud by submitting the false statements of May 30 and July 30, 1979. Therefore, defendant's assertion that the indictment failed to allege a scheme to receive money to which he was not entitled is erroneous. Further, the test for materiality is whether the false statement has a tendency to influence or is capable of influencing a federal agency. *United States v. Difonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980). The indictment clearly met this test by alleging that the false statements of May 30 and July 30 were used to conceal the fraudulent nature of the contract, thereby inducing payments to which defendant was not entitled.[5]

Finally, defendant argues that the indictment was insufficient because the mail fraud counts did not allege how the contract amount became fraudulently inflated or, more fundamentally, what constitutes a fraudulently inflated amount. Defendant also asserts that he had no duty to accurately disclose his costs to I.F.I.C., and, therefore, that concealing the true nature of the contract was not fraud.

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[5] Defendant's basic argument, which is repeated throughout his Brief, is based on civil contractual law. Although inapplicable in a criminal case, a "basic contract principle" not referred to in defendant's argument is that a contract obtained by fraud is void *ab initio*. The false statements of May 30 and July 30 were used to induce performance of the contract by concealing the fraud, and were therefore material even under defendant's misplaced contract argument.

In construing an indictment under the mail fraud statute, a broad rather than a technical standard should be used to determine the sufficiency of the allegation of fraud. *United States v. Stanford*, 589 F.2d 285, 296 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979); *United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). Moreover, we must examine the indictment as a whole to determine whether it adequately informed the defendant of the charges against him. *United States v. Debrow*, 346 U.S. 374, 376 (1953); *United States v. Stanford*, 589 F.2d at 296.

Using these guidelines, the indictment was clearly sufficient. In addition to reciting the elements of the mail fraud charge, the indictment specifically alleged that the contract amount was calculated dishonestly in that defendant knew that the Hines project could be completed for $27,500, but contracted to complete the project for $88,547. The indictment further enumerated the subsequent false statements by which defendant sought to conceal the inflated nature of the contract amount. These allegations described conduct which did not meet the standard of "fundamental honesty, fair play, and right dealing" which is used to determine fraud. *United States v. Stanford*, 589 F.2d at 596; *United States v. Keane*, 522 F.2d at 545 (*quoting Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)). Furthermore, in *Stanford*, this Court specifically rejected the argument that an indictment fails to allege fraud under § 1341 simply because the defendant owes no fiduciary duty to the victims of the fraud. *Stanford*, *supra* at 296. Therefore, the indictment fully informed defendant of the charges of fraud alleged in Counts I and II and was legally sufficient.

II. The Sufficiency of the Evidence

Defendant challenges the denial at the first trial of his motion for directed verdict and, after the mistrial was declared, his motion for judgment of acquittal. Defendant based these motions on the insufficiency of the govern-

ment's evidence. He argued in his Brief that if the evidence presented at the first trial was insufficient to support a verdict of guilty, the Double Jeopardy Clause of the Constitution barred his retrial. Defendant therefore seeks review of the sufficiency of that evidence. After defendant filed his Brief, however, the United States Supreme Court decided *Richardson v. United States*, ___ U.S. ___, 104 S. Ct. 3081 (1984), which, defendant agrees, eliminates defendant's double jeopardy argument.[6]

It is well established that retrial following a mistrial due to a hung jury does not violate the Double Jeopardy Clause. *Richardson*, ___ U.S. ___, 104 S. Ct. 3081, 3085 (1984); *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Logan v. United States*, 144 U.S. 263, 297-98 (1892). Similarly, the Double Jeopardy Clause applies only after the occurrence of an event, such as acquittal or conviction, which terminates the original jeopardy. *Richardson*, ___ U.S. at ___, 104 S. Ct. at 3086; *Justices of Boston Municipal Court v. Lydon*, 466 U.S. ___, ___, 104 S. Ct. 1805, 1813 (1984); *Price v. Georgia*, 398 U.S. 323, 326-27 (1970). Here, the declaration of a mistrial at the first trial did not terminate defendant's original jeopardy, and therefore his retrial did not violate the Double Jeopardy Clause. *See Price v. Georgia*. 398 U.S. at 326-27; *Green v. United States*, 355 U.S. 184, 189 (1957); *United States v. Ball*, 163 U.S. 662, 669 (1896). Moreover, *Richardson* holds that regardless of the sufficiency of the evidence presented at the first trial, the defendant has no valid double jeopardy claim to prevent his retrial. *Richardson*, 104 S. Ct. at 3086. Therefore, the sufficiency of the evidence at defendant's first trial is not reviewable under double jeopardy principles.

In his Supplemental Brief, defendant admits that he has no valid double jeopardy claim, but argues that appellate review of the sufficiency of the evidence at the first

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[6] In *Richardson*, the Supreme Court addressed the issue of whether a criminal defendant whose first trial resulted in a hung jury and a mistrial has a right to appellate review of the sufficiency of the evidence before retrial.

trial is necessary to protect his Due Process rights. The Due Process Clause provides that a criminal defendant may be convicted only upon proof beyond a reasonable doubt of every element of the crime with which he is charged. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). Thus, the protection of the Due Process Clause focuses on conviction, not retrial. Defendant was not convicted at his first trial, and therefore has no right to appellate review of the evidence presented at that trial under the Due Process Clause.[7]

Defendant also challenges the sufficiency of the government's evidence at the second trial, which resulted in his conviction. Upon review, we must sustain the verdict if there is "substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision." *Burks v. United States*, 437 U.S. 1, 17 (1978). *See Glasser v. United States*, 315 U.S. 60, 80 (1942). Using this standard, we conclude that the evidence presented at the second trial was sufficient to convict defendant of all four charges against him.

Defendant first contends that the government failed to prove the evidence of a scheme to defraud, as required by § 1341 for a conviction of mail fraud. The government's evidence, however, showed that defendant had close ties to both parties responsible for ensuring the fairness of the contract with I.F.I.C. Newhall, defendant's brother, had also been in business with defendant. The two of them had formed Chrismar, which was responsible for in-

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[7] In his Brief, defendant argued extensively that there was a variance between the indictment and the evidence presented at the first trial, thereby depriving him of his Fifth Amendment right not to be placed in jeopardy for offenses or facts not found by the grand jury. *See Russell v. United States*, 369 U.S. 749, 770 (1962). This issue is also not reviewable for the reasons just discussed. Defendant does not contend in either his Brief or his Supplemental Brief, which was filed after *Richardson*, that the evidence presented at the second trial varied from the allegations of the indictment.

vestigating Cleary's default on the Hines project and reporting its findings to I.F.I.C. Despite this responsibility, Newhall never reported Larson Roofing's bid to I.F.I.C., even though Chrismar's architect, Alvarado, had described the bid as reasonable.

Consentino, a close personal friend of defendant, was empowered to enter into the Hines completion contract on behalf of I.F.I.C. With the knowledge that Larson Roofing could complete the Hines project for $27,500, defendant and Consentino agreed to give Joseph Construction the contract for $88,547. Defendant then promptly subcontracted with Larson Roofing, which, as expected, completed the project for $30,000, giving defendant a profit of $58,547 on the Hines contract even though he did none of the work.

This evidence indicates that defendant, with the complicity of Newhall and Consentino, obtained a contract greatly in excess of its reasonable value, acted only to contract with a firm to do the work which I.F.I.C. could have contracted with directly, and then concealed the fact that the work was done solely by Larson Roofing through the statements of May 30 and July 30. It is therefore clear that the government presented substantial evidence to support the jury's finding of a scheme to defraud.

Second, defendant contends that he lacked the intent to defraud the government required by § 1341 because he disclosed Larson Roofing's bid to Consentino prior to contracting for the Hines project. This contention ignores the fact that the evidence, viewed most favorably for the government, indicates that Consentino complied with defendant's scheme to defraud the government, or at least relied on misrepresentations by defendant that Larson Roofing's bid was not reasonable.[8] Therefore, the jury had

[8] In his Brief, defendant states that he expressed his "concern" to Consentino regarding Larson Roofing's ability to complete the project for $27,500. The evidence indicates, however, that defendant knew the bid to be reasonable, and any representations to Consentino to the contrary can be viewed as part of defendant's scheme to defraud I.F.I.C.

substantial evidence to find defendant's intent to defraud despite the disclosure of Larson Roofing's bid to Consentino.

Defendant also contends that he did not "knowingly and willfully" make the false statements of May 30 and July 30, as required by § 1001. In support of this contention, defendant argues that the printed terms on the statements were ambiguous, and that the entries beneath those terms were not false. Specifically, defendant asserts that the term "net previously paid" did not mean that the amounts listed below that term had actually been paid, but that those amounts were "to become due" or, as in the case of Stanton Bay, were "anticipated to become due." We find that the government presented sufficient evidence for the jury to reject defendant's contention.

In addition to the evidence of the scheme to defraud detailed above, the testimony of Newhall and Alvarado stated that it was improper to list a contract with Stanton Bay when no contract existed, or to indicate that particular amounts had been paid when no such payments were made. Further, the contract with Larson Roofing was listed as $34,500 when it was actually $30,000. Even using defendant's strained definition, this amount was not to become due to Larson Roofing. Therefore, the evidence was sufficient to prove that the false statements were made with the requisite intent.

Finally, defendant contends that the evidence failed to show that the false statements of May 30 and July 30 were material, as required by § 1001. The test for materiality under this section is whether the statement had a natural tendency to influence, or was capable of influencing, the decision of a government agency in making a determination required to be made. The agency need not actually rely on the statement. *United States v. Petullo.* 709 F.2d 1178, 1180 (7th Cir. 1983); *United States v. Difonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979), *cert. denied*,

444 U.S. 1018 (1980).[9] Defendant applies the ubiquitous argument that the SBA was obligated to pay 90% of the contract between I.F.I.C. and Joseph Construction at the time of the agreement because, according to the terms of the bond guarantee program, the SBA had no discretion in determining whether to reimburse I.F.I.C. for the contract amount. Therefore, defendant asserts that the evidence did not prove that the false statements were capable of influencing the SBA's decision to reimburse I.F.I.C. and were not material.

We disagree with defendant's contentions that the SBA was required to reimburse I.F.I.C. for payment of a fraudulently inflated contract, and that the false statements of May 30 and July 30 were not capable of influencing the determination of the SBA to reimburse I.F.I.C. False statements made to conceal a fraud are no less material for the purposes of § 1001 than false statements designed to induce fraud. *See United States v. Vorhees*, 593 F.2d 346, 350 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979) (*citing United States v. Jones*, 464 F.2d 1118, 1122 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973)). Similarly, although the statements of May 30 and July 30 accurately reflected the amount of the contract between I.F.I.C. and defendant, the evidence showed that the contract amount was not the result of honest calculation, but was inflated by fraud. Therefore, even though the statements were accurate as to the total amount of the contract they constituted false statements within the meaning of § 1001 by concealing the fraudulent nature of the contract. *See United States v. Huber*, 603 F.2d 387, 398 (2d Cir. 1979), *cert. denied*, 445 U.S. 926 (1980).

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[9] Five other circuits which have addressed the issue of materiality are in agreement. *See United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982); *United States v. Markham*, 537 F.2d 187, 196 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *United States v. Cole*, 469 F.2d 640, 641 (9th Cir. 1972); *United States v. Jones*, 464 F.2d 1118, 1122 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973); *Gonzales v. United States*, 286 F.2d 118, 122 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961).

These statements were sent by I.F.I.C. to the SBA for reimbursement. They were, therefore, capable of influencing the SBA in determining the amount of reimbursement to which I.F.I.C. was entitled. Furthermore, the statements were capable of influencing the SBA in that these statements were part of I.F.I.C.'s records relating to the bond guarantee program, and the SBA reserves the right to audit the records of any surety participating in the program,[10] to vary the terms of guarantees after evaluation of a surety's practices and management of its losses,[11] and to investigate for possible violations of the statute.[12] Therefore, we find that the evidence presented at trial was sufficient to meet the materiality requirement of § 1001.

III. Agency Jurisdiction

Defendant contends that the statements of May 30 and July 30 were not submitted in a matter within the jurisdiction of a federal agency, and are therefore outside the scope of § 1001. In support of this contention, defendant asserts that he did not know of the SBA's guaranty of I.F.I.C.'s performance bond, and that this lack of knowledge is the decisive factor in determining whether the statements were within the SBA's jurisdiction because of its "peripheral" involvement in the bond guaranty program. We do not believe that this correctly states the law.

Generally, jurisdiction for the purposes of § 1001 is to be given a broad rather than a narrow meaning. *See United States v. Rodgers*, ____ U.S. ____, 104 S. Ct. 1942, 1946 (1984); *Bryson v. United States*, 396 U.S. 64 (1969). The false statement need not be submitted directly to the federal agency: it sufficies to show that the deception of a

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[10] 15 U.S.C. § 694b(g) (1978); 13 C.F.R. § 115.14(a) (1981).

[11] 13 C.F.R. § 115.6(b) (1981).

[12] 13 C.F.R. § 115.14(b) (1981).

private company affected a federal agency because of that agency's responsibility to ensure that its funds are properly spent. *United States v. Hamilton*, 726 F.2d 317, 321 (7th Cir. 1984); *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983); *United States v. Stanford*, 589 F.2d 285, 297-98 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). Moreover, "[I]t is the *existence* of federal supervisory authority that is important, not necessarily its *exercize*." *Petullo*, 709 F.2d at 1180 (emphasis original). Thus, statements may be within the purview of § 1001 even though the federal agency does not directly administer its program, but is limited to reimbursing private companies which participate in the program. *Hamilton*, 726 F.2d at 321; *Petullo*, 709 F.2d at 1180; *Stanford*, 589 F.2d at 297.

Using these principles, it is clear that defendant's statements of May 30 and July 30 were made in a matter within the jurisdiction of the SBA. The SBA was responsible for reimbursing I.F.I.C. for the completion cost of the Hines project, and the amount of reimbursement was affected by defendant's defrauding of I.F.I.C. Further, the SBA retained authority to supervise the bond guaranty program pursuant to the statute authorizing the program and the Code of Federal Regulations.[13] Therefore the SBA did not "wash its hands" of responsibility for the bond guaranty program, as defendant asserts, but retained the ultimate authority necessary for agency jurisdiction under § 1001.[14]

We also reject defendant's contention that his lack of knowledge of the SBA's involvement removed the false

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[13] *See* notes 10-12 and accompanying text.

[14] In his Brief, defendant admits that the amount of the loss on the Hines project is "colorably within the jurisdiction of the SBA," but argues again that the statements of May 30 and July 30 "truthfully" represented the amount of that loss, and were therefore not false statements within the agency's jurisdiction. Again, this argument fails because it ignores the initial fraud in calculating the contract, which greatly increased the amount of the loss on the Hines project, and which the false statements sought to conceal.

statements of May 30 and July 30 from the purview of § 1001. The authority defendant cites states only that such lack of knowledge "may be one circums ance to be considered [when the government's involvement] in the matter to which the statement relates is peripheral." *Stanford*, 589 F.2d at 297. Thus, although knowledge may be considered in determining jurisdiction, it is not required. *Stanford, supra* at 297. Rather, the focus of § 1001's jurisdiction requirement is the potential threat of the false statement to the proper functioning of the agency involved. *See United States v. Rodgers*, ___ U.S. at ___, 104 S. Ct. at 1947 (citing *United States v. Gilliland*, 312 U.S. 86, 93 (1941)); *Stanford*, 589 F.2d at 297-98.

Here, the threat of statements such as those made by defendant to the proper functioning of the SBA's bond guaranty program is great. The SBA processes such a large number of reimbursement claims through the program that it cannot investigate each claim, but must rely on the private sureties participating in the program to ensure the proper expenditure of federal funds. Defendant's false statements clearly had the potential to result in the "perversion" of a federal agency's functions which § 1001 was designed to prohibit, regardless of defendant's knowledge of the SBA's involvement. *See United States v. Rodgers*, ___ U.S. at ___, 104 S. Ct. at 1947; *United States v. Stanford*, 589 F.2d at 297-98.

IV. The Government's Attempts to Impeach Defendant

Defendant contends that the government's attempts to impeach him at his second trial with inconsistent testimony elicited at the first trial were improper on four occasions and amounted to plain error, requiring reversal and a new trial. Defendant argues that the first three allegedly improper impeachment attempts referred to answers to questions at the first trial which were taken out of context, or were in response to questions completely

different from those asked at the second trial. The fourth allegedly improper attempted impeachment was not completed, and defendant argues that such incomplete impeachment is improper.

Reversal for plain error requires obvious, substantial error, and should be granted only in exceptional circumstances. *United States v. Jackson*, 542 F.2d 403, 409 (7th Cir. 1976); *United States v. Greene*, 497 F.2d 1068, 1077 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Defendant had the opportunity to object to the impeachment attempts at trial, which he exercised in all but the second allegedly improper impeachment, and he stated the reasons why he thought the testimony was consistent. We also note that the fourth allegedly improper impeachment was not completed because of an objection by defendant at a side-bar conference. Further, defendant had an opportunity to argue the consistency of the statements which the government attempted to impeach on redirect examination. Along with these safeguards to a fair trial, we find that the trial court properly instructed the jury regarding the determination of defendant's credibility.[15] Moreover, we find substantial evidence, as outlined above, for the jury to convict defendant. Therefore, we do not find any plain error requiring reversal due to the government's attempts to impeach defendant.

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[15] The effect of any inconsistent statements upon the defendant's credibility is a jury question. *See Riggs v. Penn Central Railroad Co.*, 442 F.2d 105, 108 (7th Cir. 1971). Here, the trial court properly instructed the jury as follows:

> "You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness you may take into account his intelligence, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all of the evidence in the case."

Transcript, Vol. II, p. 539.

V. Prosecutor's Comments During Closing Argument

Finally, defendant contends that comments made by the government during closing argument to the effect that defendant sought to "gouge" I.F.I.C. and obtain "money that he didn't deserve" were improper and require reversal. Defendant also contends that the government improperly inferred that the witnesses testifying under a grant of immunity were entitled to a greater degree of credibility than others, and that the government improperly referred to certain jury instructions as the "defendant's" jury instructions. Last, defendant contends that the government improperly sought to rebut defendant's assertion that I.F.I.C. did not receive the false statements by arguing that staple holes in a letter to I.F.I.C. showed that the false statement was attached as enclosure.

In closing argument, the prosecutor may make any comments supported by the evidence or in reply to any argument raised by his opponent. *United States v. Jackson*, 542 F.2d 403, 410 (7th Cir. 1976). Moreover, the closing argument must be viewed as a whole to determine whether any improper statements were unfairly prejudicial. *United States v. Duff*, 551 F.2d 187, 189 (7th Cir. 1977); *United States v. Jackson*, 542 F.2d at 410. In order to constitute reversible error, these statements must be calculated to unfairly prejudice the defendant or suffice to alter the outcome of the trial. *Berger v. United States*, 295 U.S. 78, 85 (1935); *United States v. Winograd*, 656 F.2d 279, 284 (7th Cir. 1981), *cert. denied sub nom., Siegal v. United States*, 455 U.S. 989 (1982); *United States v. Spain*, 536 F.2d 170, 174 (7th Cir.), *cert. denied*, 429 U.S. 833 (1976). Using these guidelines, we find no reversible error in the government's closing argument.

We do not find that the prosecutor's statements that defendant sought to "gouge" I.F.I.C. were calculated to improperly influence the jury's decision. The statements did not inaccurately describe the essence of defendant's

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actions and the closing argument as a whole was not inflammatory. Further, the jury was properly instructed as to the elements of the offenses charged, and was also instructed as to several defenses to the charges proferred by defendant. Moreover, the jury had substantial evidence upon which to base its verdict. Therefore, these statements did not constitute reversible error.

Defendant objected at trial to each of the last three allegedly improper comments, and each objection was sustained. The trial judge properly instructed the jury to disregard any evidence to which the court sustained an objection, and to disregard any comments of counsel which were not supported by the evidence. We do not find that, in light of the entire trial, the comments altered the jury's verdict or were calculated to unfairly prejudice the defendant. Therefore, these statements were not so unfairly prejudicial as to constitute reversible error.

For the reasons given herein, the judgments of conviction are affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

SWORN STATEMENT FOR CONTRACTOR AND SUBCONTRACTOR TO OWNER

State of Illinois
County of Cook

GOVERNMENT EXHIBIT 118

Request No. 1

The affiant, Robert J. Brack (Name), being first duly sworn, on oath deposes and says that he is President of Joseph Construction Company, P.O. Box M866 Gary, Indiana 46401 (Position) (Business Name, Address and Phone Number) that he has a contract with International Fidelity Insurance Company (Name of Owner) for the General Construction (Kind of Work) on the following described premises in said County, to-wit: V. A. Hospital - Hines Facility

That, for the purpose of said contract, the following persons have been contracted with, and have furnished, or are furnishing and preparing the materials for, and are doing or are about to do labor on said improvement, that there is due and to become due them, respectively, the amounts set opposite their names for the labor or labor and materials. That this statement is a full, true and complete statement of all such persons, and of the amounts paid.

1 Name and Address	2 Kind of Work	3 Adjusted Total Contract Incl. Extras and Credits	4 Total Statement including this application	5 Not Previously Paid	6 Net Amount of This Payment	7 Balance To Become Due (Incl. Retention)
Larson Roofing Co. Riverside, Il	Roof	34,500.			11,500.	23,000.
Stanton Bay Const.	Slate Repair	31,381.			20,460.	10,921
Joseph Construction Gary, Indiana	Supervision	10,400.			3,500	6,900
Joseph Construction Gary, Indiana	General Conditions	12,266			4,100	8,166
TOTAL		88,547.			39,560.	48,987.

AMOUNT OF ORIGINAL CONTRACT	$	WORK COMPLETED TO DATE	$ 39,560.
EXTRAS TO CONTRACT	$	LESS -----% RETAINED	$
TOTAL CONTRACT AND EXTRAS	$	NET AMOUNT EARNED	$ 39,560.
CREDITS TO CONTRACT	$	NET PREVIOUSLY PAID	$
ADJUSTED TOTAL CONTRACT	$	NET AMOUNT OF THIS PAYMENT	$ 39,560.
		BALANCE TO BECOME DUE (Inc. Retention)	$ 48,987.

It is understood that the total amount paid to date plus the amount requested in this application shall not exceed ____ % of the cost of work done to the date hereof.

I agree to furnish Waivers of Lien for all materials under my contract unless demanded.

Signed: [signature] (Position)

Subscribed and sworn to before me this 30th day of May 1972

[signature], Notary Public

BEST AVAILABLE COPY

SWORN STATEMENT FOR CONTRACTOR AND SUBCONTRACTOR TO OWNER

State of Illinois
County of Cook

GOVERNMENT EXHIBIT 168

Request No. 2

The affiant, Robert J. Brack (Name), being first duly sworn, on oath deposes and says that he is President (Position) of Joseph Construction Company P.O. Box M866 Gary, Indiana 46401 (Firm Name, Address and Phone Number), that he is the contractor for International Fidelity Insurance Company, owner, for General Construction (Work) on the following described premises in said County, to-wit: V. A. Hospital - Hines Facility

That, for the purpose of said contract, the following persons have been contracted with, and have furnished, or are furnishing and preparing materials for, or are doing or are doing labor on said improvement, That there is due and to become due them, respectively, the amounts set opposite their names for materials or labor as stated, That this statement is a full, true and complete statement of all such persons, and of the amounts paid.

1 Name and Address	2 Kind of Work	3 Allowed Total Contract (Incl. Extras and Credits)	4 Total Retained (Including this application)	5 Net Previously Paid	6 Net Amount of this Payment	7 Balance To Become Due (Incl. Retention)
Larson Roofing No. Riverside, IL	Roof	34,500.		11,500.	11,500.	11,500.
Stanton Bay Const.	Slate Repair	31,381.		20,460.	10,921.	
Joseph Construction Gary, IN	Supervision	10,400.		3,500.	3,450.	3,450.
Joseph Construction Gary, IN	General Conditions	12,266.		4,100.	4,083.	4,083.
TOTAL		88,547.		39,560.	29,954	19,033.

AMOUNT OF ORIGINAL CONTRACT	$	WORK COMPLETED TO DATE	$ 69,514.
EXTRAS TO CONTRACT	$	LESS " " % RETAINED	$
TOTAL CONTRACT AND EXTRAS	$	NET AMOUNT EARNED	$ 69,514.
CREDITS TO CONTRACT	$	NET PREVIOUSLY PAID	$ 39,560.
ADJUSTED TOTAL CONTRACT	$	NET AMOUNT OF THIS PAYMENT	$ 29,954.
		BALANCE TO BECOME DUE (Inc. Retention)	$ 19,033.

It is understood that the total amount paid to date plus the amount requested in this application shall not exceed ____% of the cost of work completed to date.

I agree to furnish Waivers of Lien for all materials under my contract when demanded.

Signed [signature] (Position)

Subscribed and sworn to before me this 30th day of July, 19 79

Mildred Bojic Notary Public

BEST AVAILABLE COPY